

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

United States of America,)	CR 04-01508-TUC-CKJ(HCE)
Plaintiff,)	REPORT AND RECOMMENDATION
vs.)	
Reynaldo Oros-Oros,)	
Defendant.)	

Pending before the Court is Defendant's Motion For Resolution Of Outstanding Release Revocation Proceedings (Doc. 27). For the reasons stated herein, the Magistrate Judge recommends that the District Court deny Defendant's Motion as premature and improvidently filed.

I. PROCEDURAL BACKGROUND

Defendant was originally indicted in CR 04-01508-TUC-CKJ for Illegal Re-entry After Deportation, in violation of 8 U.S.C. §1326(a), with enhanced punishment under 8 U.S.C. §1326(b)(2). (Doc. 6). Defendant pleaded guilty to the offense on October 15, 2004. (Doc. 12). On February 16, 2005, the Court sentenced and ordered Defendant committed to the Bureau of Prisons for 41 months of incarceration, followed by 24 months of supervised release, which commenced on June 12, 2007. (Doc. 18). The Court was required to order "as an explicit condition of supervised release, that [he] not commit another Federal, State, or

1 local crime during the term of supervision” *See* 18 U.S.C. §3583(d).¹ Defendant was
 2 deported on August 18, 2007 through Hidalgo, Texas. (Doc. 23). Defendant was found in the
 3 United States without authorization on October 21, 2008 when he was arrested by
 4 immigration officials in the city of Kelso in the Western District of Washington. (*Id.*).

5 As a consequence of Defendant’s arrest in the Western District of Washington, a
 6 Petition to Revoke Supervised Release from the District of Arizona-Tucson Division issued
 7 on May 1, 2009. (Doc. 23). An attendant warrant for Defendant’s arrest also issued on May
 8 4, 2009. (Doc. 24). As part of the Court’s order for Defendant’s arrest for violation of his
 9 supervised release, the Court ordered that “Defendant [is] to be held without bond pending
 10 an appearance before this court by CINDY K. JORGENSEN, United States District Judge.”
 11 (*Id.*). As of the date of this Report and Recommendation, the warrant for Defendant’s arrest
 12 has not been executed, served and returned.²

13 The Defendant was indicted for Illegal Re-entry After Deportation, in violation of 8
 14 U.S.C. §1326(a), with enhanced punishment under 8 U.S.C. §1326(b)(2), in the Western
 15 District of Washington in CR 09-05073-001-RBL. On June 19, 2009, the Honorable Ronald
 16 B. Leighton sentenced and ordered Defendant committed to the Bureau of Prisons for 42
 17 months of incarceration.

18 **II. ANALYSIS**

19 Defendant seeks to expedite and resolve the pending Petition to Revoke Supervised
 20 Release filed in the instant case, urging the Court to consider sentencing factors pursuant to
 21 18 U.S.C. §3553(a), to modify or reduce any disposition, or alternatively order that such
 22 disposition be imposed concurrent to the sentence being served in CR 09-05073-001-RBL

25 ¹Petition to Revoke Supervised Release, Allegation A: Violation of Standard
 26 Condition 1: You shall not commit another federal, state, or local crime during the term of
 supervision. (Doc. 23).

27 ²It is anticipated that the arrest warrant will be served on Defendant upon discharge
 28 from imprisonment in CR 09-05073-001-RBL.

1 out of the Western District of Washington.³ Defendant's Motion For Resolution Of
 2 Outstanding Supervised Release Revocation Proceedings (Doc. 23) is prematurely and
 3 improvidently filed:

4 *A person held in custody for violating ... supervised release must*
 5 *be taken without unnecessary delay before a magistrate....(B) If*
 6 *the person is held in custody in a district other than where an*
 7 *alleged violation occurred, the initial appearance must be in that*
 8 *district, or in an adjacent district if the appearance can occur*
 9 *more promptly there.*

10 Fed.R.Crim.P. 32.1(a)(1)(B) (emphasis added). Defendant herein is not being held for having
 11 violated supervised release, but rather, is serving a sentence in a case unrelated to the instant
 12 case.

13 Once the District of Arizona warrant issued by this Court for Defendant's arrest is
 14 executed and served upon Defendant, wherever he may be incarcerated pursuant to Rule
 15 4(c)(1) and (2) of the Federal Rules of Criminal Procedure, he will then have an initial
 16 appearance. Fed.R.Crim.P. 32.1(a)(1)(B). At the initial appearance Defendant will then be
 17 informed of the alleged violation of supervised release; the right to retained counsel or to
 18 request that counsel be appointed if Defendant cannot obtain counsel; and his right to a
 19 preliminary hearing. Fed.R.Crim.P. 32.1(a)(3) and (b)(1).

20 If the court conducting the preliminary hearing finds that there is probable cause to
 21 believe that a violation of supervised release occurred, Defendant will be ordered transferred
 22 to the district that has jurisdiction, i.e., the District of Arizona-Tucson Division.
 23 Fed.R.Crim.P. 32.1(a)(5)(B) and 32.1(b)(1)(C). Defendant may waive the preliminary
 24 hearing. Fed.R.Crim.P. 32.1(b)(1)(A). In either event, the court before whom Defendant
 25 appears will transfer Defendant to the District of Arizona-Tucson Division once the
 26 Government produces certified copies of the judgment, warrant and warrant application and
 27 the court finds that Defendant is the same individual named in the warrant. Fed.R.Crim.P.
 28 32.1(a)(5)(B)(i) and (ii).

³Defendant is currently incarcerated at the Federal Correctional Institution in
 Edgefield, South Carolina.

1 Once Defendant is transferred to the District of Arizona, he will have an initial
 2 appearance at which time a revocation hearing will be set within a reasonable time.
 3 Fed.R.Crim.P. 32.1(b)(2). At the revocation hearing the Court, or Magistrate Judge if
 4 consented to by Defendant, must make a finding by a preponderance of the evidence that
 5 Defendant violated his conditions of supervised release. 18 U.S.C. §3583(e)(3); *see* 18
 6 U.S.C. §3401(i).

7 If Defendant is found to have violated the conditions of supervised release by
 8 committing a Federal crime, i.e. Illegal Re-entry After Deportation in CR 09-0573-001-RBL
 9 in the Western District of Washington, he may then invoke the various factors outlined in 18
 10 U.S.C. §3553(a) for purposes of his disposition in the instant case. Title 18 U.S.C. §3584(a)
 11 and (b) are inapplicable for they pertain to the imposition of concurrent or consecutive
 12 *sentences*, not revocation of supervised release *dispositions*. Furthermore, the United States
 13 Sentencing Commission has promulgated the *guidelines or general policy statements*
 14 regarding the appropriate use of the provisions for modification of supervised release under
 15 18 U.S.C. §3583(e). *See* 28 U.S.C. §994(a)(3). Consequently, the Introductory Commentary
 16 to Part B of Chapter 7 states that “[i]t is the *policy of the Commission* that the sanction
 17 imposed upon revocation *is to be served consecutively* to any other term of imprisonment
 18 imposed for any criminal conduct that is the basis of the revocation.” U.S. Sentencing
 19 Guidelines Manual, ch. 7, pt. B, introductory cmt. (2004-2010) (emphasis added); *see also*
 20 U.S.S.G. §7B1.3(f)(term of imprisonment imposed upon revocation of supervised release
 21 “*shall be ordered to be served consecutively* to any sentence of imprisonment that the
 22 defendant is serving”) (emphasis added); *United States v. Kikuyama*, 150 F.3d 1210 (9th
 23 Cir. 1998).

24 **III. CONCLUSION**

25 As outlined above, Defendant moves for relief in the instant case before he has gone
 26 through the procedural channels he must necessarily take in order to petition the Court for
 27 the relief he seeks. Defendant’s Motion For Resolution Of Outstanding Supervised Release
 28 Revocation Proceedings (Doc. 27) is premature and improvidently filed.

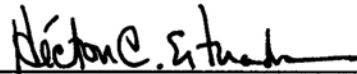
1 **IV. RECOMMENDATION**

2 For the foregoing reasons, pursuant to 28 U.S.C. §636(b)(1)(B), the Magistrate Judge
3 recommends that the District Court deny Defendant's Motion For Resolution Of Outstanding
4 Supervised Release Revocation Proceedings (Doc. 27).

5 Pursuant to 28 U.S.C. 636(C) and Rule 59(b)(2) of the Federal Rules of Criminal
6 Procedure, any party may serve and file written objections within fourteen (14) days after
7 being served a copy of this Report and Recommendation. If objections are filed, parties
8 should use the following case number: **CR 04-01508-TUC-CKJ**.

9 Failure to file objections in accordance with Fed.R.Crim.P. 59 will result in waiver
10 of the right to review.

11 DATED this 17th day of November, 2010.

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Héctor C. Estrada
United States Magistrate Judge
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